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ABSTRACT

The impact of the Copyright Revision Act of 1976 (P.L. 94-553) on performances of music at colleges, universities, and other educational institutions is discussed. The new statute has removed the general "not-for-profit" exemption of the old copyright law and has substituted in its stead certain specific exemptions including performances of nondramatic musical works in face-to-face teaching activities of a nonprofit institution in a classroom and broadcasting as a regular part of systematic instruction of a nonprofit educational institution for reception in classrooms. With respect to the performance of nondramatic works, educational institutions are required to pay royalties only in instances where there is a public performance for the purpose of the institution's direct or indirect commercial advantage, or where a performer or organizer receives a fee. In all other activities involving the performance of nondramatic works, there is no liability if there is no admission charge or if there is an admission charge and (1) proceeds are used exclusively for educational purposes and (2) the copyright owner has not served written notice of objections seven days prior to the performance. Requirements for private performances, jukeboxes, and the operation of an ordinary radio or television set in public are explained. Negotiations with the three organizations representing the copyright owners of music for development of a blanket license are described and the basic terms of the agreements with each of the organizations are provided. Also provided are the texts of: (1) Section 110 of the Copyright Revision Act of 1976; (2) House Judiciary Committee discussion of Section 110 (4) from Report 94-1476; and (3) Copyright Office Final Regulations of December 28,1977. (SPG)

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Licensing and Royalties for Campus Performances of Music

The Copyright Revision Act of 1976 (P. L. 94-553) (hereinafter referred to as the New Copyright Law) became effective on January 1, 1978. This statute has a dramatic impact on performances of music at colleges, universities, and other educational institutions. Under the old copyright law, public performances of musical compositions were subject to control by the copyright owner of the music only in cases where a performance was "for profit." The new statute has removed this general "not-for-profit" exemption and has substituted in its stead certain specific exemptions.

These exemptions are set forth in section 110 of the New Copyright Law. Briefly described, these specific exemptions insofar as applicable to the performances of nondramatic musical works are:

(1) face-to-face teaching activities of a nonprofit institution in a classroom or similar place devoted to instruction [section 110(1)];

This report is issued jointly by the American Council on Education (ACE) and the National Association of College and University Business Officers (NACUBO). It is the product of the work of a higher education task force which has been studying issues related to music royalties and the New Copyright Law, and has been negotiating with organizations representing the copyright owners of music. In addition to ACE and NACUBO, this task force includes the Association of College, University, and Community Arts Administrators, Inc., the Association of College Unions—International, the National Association of Schools of Music, and the National Entertainment and Campus Activities Association.

This report is not copyrighted. ACE and NACUBO urge any additional reprintings and distributions that may be required to assure that this report is made available to persons on campus who have concerns related to music royalties. Additional copies are available in limited supply from: NACUBO, One Dupont Circle, Suite 510, Washington, D. C. 20036.

Readers are cautioned that nothing contained in this report is intended as a substitute for the use of individual judgment and the advice of informed legal counsel, as appropriate.

(2) broadcasting as a regular part of systematic instruction at a nonprofit educational institution for reception in classrooms [section 110(2)]; and

(3) a more generally worded exemption which provides that the following is not an infringement of copyright:

"performance of a nondramatic literary or musical work otherwise than in a transmission to the public, without any purpose of direct or indirect commercial advantage and without payment of any fee or other compensation for the performance to any of its performers, promoters, or organizers, if —

(a) there is no direct or indirect admission charge; or

(b) the proceeds, after deducting the reasonable costs of producing the performance, are used exclusively for educational, religious, or charitable purposes and not for private financial gain, except where the copyright owner has served notice of objection to the performance under the following conditions:

(i) the notice shall be in writing and signed by the copyright owner or such owner's duly authorized agent; and

(ii) the notice shall be served on the person responsible for the performance at least seven days before the date of the performance, and shall state the reasons for the objection; and

(iii) the notice shall comply, in form, content, and manner of service, with requirements that the Register of Copyrights shall prescribe by regulation." [section 110(4)] [Emphasis Added]

Based on this general exemption, it seems clear that an educational institution need not pay royalties if it does not pay the performers AND

(1) no admission fee is charged

OR

(2) an admission fee is charged but the net proceeds are used exclusively for educational purposes and the copyright owner does not serve a timely objection.

With respect to the performance of nondramatic works, educational institutions are required to pay royalties only in instances where there is a public performance for the purpose of the institution's direct or indirect commercial advantage, or where a performer or organizer receives a fee. In all other activities involving the performance of nondramatic works, there is no liability if there is no admission charge or if there is an admission charge and (1) the proceeds are used exclusively for educational purposes and (2) the copyright owner has not served written notice

of objections seven days prior to the performance, in accordance with regulations issued by the Copyright Office (see reprint beginning on page 19).

The exemption of "nondramatic" works, as this term is used in the statute, means that performances of opera, musical comedy, oratorios and the like are not exempt under this section.

(The above discussion has focused on exemptions specifically included in the New Copyright Law. Another general exemption for some uses of music is that "fair use" of copyrighted material is not an infringement. This report does not deal with the complex issues of "fair use." It covers performances that do not involve "fair use" as specified in the statute.)

The provisions of the new statute for the licensing of music apply to live performances by musicians as well as to the playing of phonographic records or tapes. There are some general provisions of the law, however, applicable to commercial as well as educational institutions. These are of special interest to colleges and universities because, under the circumstances stated, even a musical performance does not require a copyright license. They include:

(1) Private Performances——Performances that are not "public" performances cannot be infringements. Unlike the old law, the New Copyright Law defines what is a "public" performance. Under section 101 of the new statute, a performance is deemed to be "public" if it occurs "at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and social acquaintances is gathered." The House of Representatives Report accompanying the new statute states that the term "a family" in this context would include an individual living alone so that a gathering confined to the individual's social acquaintances would normally be regarded as private. However, the House Report also says that performances in "semi-public" places such as clubs, lodges, factories, summer camps and schools are public performances subject to copyright control. On the other hand, the House Report says that routine meetings of business and governmental personnel would be excluded because they do not represent the gathering of a "substantial number of persons."

There has been no judicial interpretation of this new definition as yet. However, it is likely that a small number of students gathered in the private quarters of a student in a college dormitory to perform music would not be engaged in a public performance. Of course, performances in a classroom are covered by the exemption and are not infringements if they comply with the conditions in section 110(1).

(2) Jukeboxes——The operator of a coin-operated phonorecord player, commonly called a "jukebox," may under the new law (section 116) obtain a compulsory license to perform musical works on that machine upon payment to the U.S. Copyright Office of an $8.00 fee and upon attaching to the machine a certificate showing that payment. (U.S. Copyright Office, Library of Congress, Washington, D. C. 20559.) Where the operator of the jukebox has obtained such a certificate, the proprietor of the establishment in which the jukebox is played is also exempt from copyright control. However, in order to qualify for the compulsory license, the jukebox must meet each of the four following conditions:

(a) It must be used for no purpose other than the performance of nondramatic musical works by means of phonorecords (thereby excluding coin-operated radio and television sets or motion picture exhibition devices); and

(b) The establishment where the jukebox is located must make no direct or indirect charge for admission; and

(c) The jukebox must be accompanied by a list of the titles of all musical works available for performance on it, and that list must be either affixed to the machine itself or posted in the establishment in a prominent position; and

(d) The jukebox must provide a choice of works available for performance and must allow the choice to be made by the patrons of the establishment in which it is located. Thus, a machine that merely provides continuous music without affording any choice as to the specific composition to be played at a particular time (or a case where selections are made by someone other than the patrons of the establishment) would be outside the scope of the definition.

(Copyright Office final regulations published in the December 20, 1977 Federal Register include guidelines regarding "Recordation and Certification of Coin-Operated Phonorecord Players.")

(3) Operation of an Ordinary Radio or Television Set in Public——Small establishments which merely operate a home-type receiver which is not of sufficient size to justify, as a practical matter, a subscription to a commercial background music service are subject to a special exemption under section 110(5) unless a direct charge is made to see or hear the transmission. However, where the public communication is made by means of something other than a home-type receiving apparatus, or where the establishment actually makes a further transmission from the point of reception to another public place, the exemption does not apply. Of course, if music is supplied by an organization such as Muzak, which already has a license from the copyright owners or the performing societies representing the copyright owners, no separate license is required by the educational organization. Moreover, under the terms of the three agreements (see below), "piped-music" (where radio, television, or taped music is amplified by means of numerous speakers in a building such as a student union, dining hall, or dormitory) would be included under the blanket license fee.

NEGOTIATIONS

To deal with the impact on colleges and universities of the new music copyright provisions, a task force was formed in November 1977 to enter into negotiations for the development of licensing arrangements with the three organizations representing the copyright owners of music:

American Society of Composers, Authors and Publishers (ASCAP)
Society of European Stage, Authors and Composers (SESAC)
Broadcast Music Incorporated (BMI)

Organizations represented on this task force are listed in the note on page 1 of this report.

The goal of this task force was to develop arrangements that would meet the diverse and unique needs of higher education. A further objective was to make the basic terms and conditions relating to all three agencies the same, with the only difference being financial terms which would be related to the approximate size of their repertoires. Negotiations have allowed only a partial realization of these objectives.

While it is recognized that composers of music have a right to equitable payment for the use of their creative works, the higher education task force has urged the performing rights organizations to take cognizance of the fact that the payment of royalties by colleges and universities is a new concept, and one which should be limited in amount and exacted with little administrative burden.

The process of negotiating a model license for use of music on campus has been a complex task. The diversity of programs among institutions has made it particularly difficult to forge one agreement which would be reasonable and equitable for all institutions. In addition, there are numerous issues upon which the New Copyright Law is not specific and which will have to await definitive judicial determinations.

For example, although the higher education task force is firmly convinced that the performance of music at half-time shows of football games and by "pep bands" at basketball games is not subject to royalty payment unless the musicians are paid, the licensing organizations strongly question this view. The courts will eventually settle this and similar questions. In the interim, the higher education task force decided to seek a blanket license that would protect institutions from copyright infringement liability which could result in heavy penalties including the assessment of costs and attorneys' fees.

The decision to seek a blanket license followed extensive discussion with members of the higher education community familiar with various uses of music on campus. Knowledgeable music copyright attorneys in Nashville and New York were also consulted prior to this decision. The wide range of musical activity, live and recorded on campus including concerts, coffee houses, dances, discos, sporting events, radio stations, and piped-music, led to the conclusion that a blanket license which would require minimal supervision by colleges and universities would offer distinct advantages by providing broad protection for the use of music subject to royalty payment.

Each of the three performing rights societies is sending directly to every college and university the proposed licensing agreements which have been reviewed by the higher education task force. These agreements represent the best that the task force has been able to achieve through the process of negotiation. These are model licenses and are by NO means binding on the college or university. Each institution should make its own decision about the legal and financial aspects of each agreement. (Unfortunately, SESAC did not cooperate with the higher education task force and has already sent its license to each institution during the week of March 13. The BMI license was expected to be sent to each institution during the week of March 20. The ASCAP license is expected to be sent in early April.)

In order to secure comprehensive protection against copyright infringement claims, it is necessary to obtain a license from each of the three organizations. Each of the organizations has different music (and sometimes different arrangements of the

same music) that it licenses.

It has been suggested by some individuals that the best way to deal with the New Copyright Law might be to have the performer pay the royalties on any music played. The higher education task force considered this proposal and found it to be legally permissible but impractical. The standard contracts of the American Federation of Musicians and the American Guild of Musical Artists bar performers from assuming any license fees. The AFM contract reads:

> Leaders and members of the federation are prohibited from assuming any responsibility for the payment of license fees for any composition they play and from assuming or attempting to assume any liability whatsoever for royalties, fees, damage suits, or any other claims arising out of the playing of copyrighted compositions.

It would therefore be difficult to contract with any AFM or AGMA members for the payment of royalties by them. If nonunion musicians were engaged and they assumed the obligation to pay royalties but defaulted, it would be difficult and in many cases impossible for the institution to enforce that obligation and to be relieved from the liability that it might have incurred itself toward the copyright owner as a result of such performances on its premises.

MINIMAL USER

Due to the diversity of institutions and their musical programs, the higher education task force has pushed vigorously for a minimal user option as an alternate approach to a blanket license. It is assumed that for the majority of institutions a blanket license covering all types of activities appears to be a sensible and economical way to approach the problem.

The proposed licenses (see below) cover, but are not limited to, concerts (where the performer's fee is under $1,000), coffee houses, dances, discos, sporting events, some radio stations and piped-music. However, for some institutions charges based primarily on enrollment may result in excessive royalty payments in light of the amount of music performed. Some institutions, including a number with substantial enrollment, may have limited uses of music and may wish to separately license those specific dances, concerts, and other uses of music rather than enter into a blanket license. Each licensing organization has offered a very limited option for the minimal user (as set forth below), but has been unwilling to offer individual licenses for other uses of music.

An institution which is an occasional user of music may reduce its financial obligation by scrutinizing the music played on its campus. If it finds that music licensed by a particular performing rights organization is not played at all, it may consider not taking out a license with that group.

If the institution is only an occasional user of music, such as a few dances or concerts a year, or does not have a radio station, piped-music, or other uses of music which may give rise to liability for royalty payments, it is suggested that legal counsel be consulted to consider the following:

(1) Evaluate whether the minimal user offer meets the needs of the institution; and

(2) If there are occasional uses which are not covered, contact each licensing organization and provide a list of anticipated uses (grouped by type) for the known period, and request separate licensing for each type of activity. The license fees quoted by the organizations should not exceed the prevailing commercial rates for similar use.

TERMS OF THE AGREEMENTS

The basic terms of the agreements with each of the organizations follow. Each license should be carefully reviewed by each college or university for all terms and conditions.

ASCAP and BMI have developed a nonseverable two-tier license that includes:

Tier One——a general coverage provision based on full-time equivalent enrollment.

Tier Two——a per performance charge when the performer's fees are $1,000 or more.

ASCAP

Tier One

Minimum fee	$50.00
Annual fee per FTE student	.06

Tier Two

Concert schedule rates when performer fees are $1,000 or over:

Seating Capacity	Highest Price of Admission Exclusive of Tax				
	Up to $3.00	$3.01 to $6.00	$6.01 to $9.00	$9.01 to $12.00	$12.01 and Over
Up to 750	$ 15	$ 22	$ 31	$ 44	$ 57
751-1500	21	29	41	55	70
1501-2500	29	41	53	70	85
2501-4000	41	53	65	85	100
4001-5500	53	65	80	100	125
5501-7500	65	80	100	125	150
7501-10,000	80	100	125	150	180
10,001-15,000	100	125	150	180	210
15,001-20,000	125	150	180	210	240
20,001-25,000	150	180	210	240	270
25,001-40,000	180	210	240	270	300
Over 40,001	210	240	270	300	330

(continued)

DISCOUNTS:

1. Twenty-Five or more Concerts: A discount of 20% may be deducted from the above fees for payment for each concert in excess of twenty-five performed by LICENSEE during the contract year or any renewal term thereof.
2. Advance Payment for One Hundred or more Concerts: A discount of 5% may be deducted from the above fees for payment in advance by LICENSEE to SOCIETY for one hundred or more separate concerts.

Music Included

Under the proposed agreement, all concerts are included. Even if no ASCAP music is performed, ASCAP will require payment under the proposed agreement as long as the performers receive $1,000 or more.

Minimal User

Due to the varying types and amounts of music used, ASCAP has been unwilling to offer minimal user licenses. It has agreed to receive from institutions requests that identify the types of uses and to consider licenses to meet these needs.

BMI

Tier One

Minimum fee	$60.00
Annual fee per FTE student	.055

Tier Two

Concert schedule rates when performer fees are $1,000 or over:

Schedule of Rates

CATEGORY	SEATING CAPACITY	FEE PER PERFORMANCE
1	Up to 1,500 seats	$15.00 minimum
2	1,501 to 2,500 seats	$25.00
3	2,501 to 5,000 seats	$40.00
4	5,001 to 7,500 seats	$55.00
5	7,501 to 8,500 seats	$70.00
6	8,501 to 10,000 seats	$85.00
7	10,001 to 12,500 seats	$100.00
8	12,501 to 15,000 seats	$140.00
9	15,001 to 17,500 seats	$160.00
10	17,501 to 20,000 seats	$180.00
11	20,001 to 30,000 seats	$200.00
12	Over 30,000 seats	$300.00 maximum

Music Included

If the total program is music in the public domain and if appropriate reports are submitted, no fee need be paid. If the music performed is in the repertoire of another licensing organization, a fee must be paid if the performer receives over $1,000.

Minimal User

If an institution utilizes only musical attractions as defined in the license, the per student fee need not be paid. Instead, a fee must be paid based on the schedule of rates on page 8, regardless of the amount paid to the performers.

SESAC

SESAC has adopted a one-tier approach, as follows:

Minimum fee $50.00
Annual fee per FTE student, as follows:

Total Enrollment	Rate Per Year
01 to 3,000	$ 50
3,001 to 5,000	80
5,001 to 7,000	120
7,001 to 10,000	180
10,001 to 20,000	320
20,001 and larger	440

The SESAC schedule covers all performances without additional fees.

Minimal User

If an institution has two or less concerts per year it should advise SESAC of the number of concerts per year and the seating capacity. SESAC will issue individual licenses but has not as yet been willing to specify rates.

PAYMENT SCHEDULES

(1) ASCAP:

First payment for FTE fee due September 1, 1978, for period from January 1, 1978, through June 30, 1978, prorated.

Second payment for FTE fee due December 31, 1978 for period from July 1, 1978, through June 30, 1979, prorated.

Third payment due December 31, 1979 for period from July 1, 1979 through December 31, 1979.

Individual concert fees are due monthly (10th of the following month).

(2) BMI:

First year——one-half student fee due June 10, 1978
one-half student fee due October 10, 1978

Second year——one-half student fee due January 10, 1979
one-half student fee due July 10, 1979

Individual concert fees are due monthly (10th of the following month).

(3) SESAC:

Semi-annually, one-half as of signing and one-half as of July 1, 1978.

CAMPUS RADIO STATIONS

(1) ASCAP:

The higher education task force has been unable to reach an accord with ASCAP regarding the licensing of college radio stations. It has therefore petitioned the Copyright Royalty Tribunal to set an appropriate rate for all college stations excluding those represented by National Public Radio (those stations with minimum annual budgets of $80,000 or more).

Until license fees are determined by the Copyright Royalty Tribunal, noncommercial college radio stations are protected by the not-for-profit exemption provided under the old statute. The decision by the Tribunal is expected in early June. Liability for payment of fees determined by the Tribunal will be effective thirty days from the Tribunal's final determination.

(2) BMI:

The blanket license agreement forwarded to institutions by BMI will include within the per FTE fee coverage of all noncommercial college radio stations and those commercial stations with gross advertising revenue receipts of less than $10,000. Stations with gross income of over $10,000 from the sale of airtime will pay the usual BMI commercial rate for such stations.

(3) SESAC:

Under the blanket license agreement, all carrier current and "class D" FM stations up to 20 watts will be included within the per capita

charge. For FM stations above 20 watts, the higher education task force has sought a determination from the Copyright Royalty Tribunal as to the appropriate fee. It is therefore suggested that institutions that receive an individual radio license from SESAC not sign such a license but await the Tribunal's determination. Under the copyright law, a nonprofit institution is legally protected in its use of SESAC music until the Tribunal makes its determination.

ADDITIONAL INFORMATION

"FTE Enrollment": The higher education task force insisted that FTE enrollment be defined as full-time equivalent undergraduate and graduate student as submitted in "Opening Fall Enrollment," Higher Education General Information Survey (HEGIS), National Center for Educational Statistics, Department of HEW. ASCAP and BMI have used similar language. SESAC has used Barron's enrollment report in its proposed license. If this information is not readily available, it is suggested that institutions revise the contract to calculate enrollment on the basis of HEGIS.

Seating Capacity: If activities do not have formal seating (such as a concert in a ballroom or outdoors) then seating capacity should be determined by the institution by estimating the number of persons attending a performance.

Roping (collapsing hall): This concept of "roping" has been accepted by both ASCAP and BMI for use in conjunction with the concert schedules which are based on the size of the facility. It provides that if the total number of seats made available for a particular musical attraction is less than the capacity of the facility, the "altered" seating capacity made available for that particular performance shall be the basis for payment. For example, if an institution has an auditorium of 4,000 seats and for a particular concert it would only plan to use and sell 1,000 seats, then the hall could be classified for the purpose of that event as a 1,000-seat auditorium.

Grand Rights: Musical comedy, dramas, plays, opera, ballet, modern dance oratorios, and choral works are covered under a different licensing structure and are not included in the licenses granted by ASCAP, BMI and SESAC.

Symphony and Chamber Orchestras: ASCAP and BMI have advised that symphony and chamber orchestras may have licenses directly from ASCAP and BMI and, therefore, may be excluded from payment of royalties by the institution to avoid double payment of royalties. SESAC includes coverage in its proposed license. Agreement should be made with all performers as to who is responsible for royalty payments.

Rental of Facilities: If a school leases its facilities to an outside group which has music performed and the school maintains sponsorship and control over

the event, then no further license need be taken out, with the exception of the fee to be paid for concerts where the performer is paid over $1,000. This fee, of course, may be passed on to the person or organization that leases the facility. In other instances, an educational institution may become liable as a vicarious infringer of copyright if a performance of copyrighted music takes place on its premises and if

(1) The performance is not exempt under the provisions of section 110(4) and the institution has not secured a license from the copyright owner or the performing organizations (ASCAP, BMI, and SESAC) or the performance exceeds the use permitted by the licenses; and

(2) The institution expects a commercial gain or direct or indirect benefit from the performance (other than a flat rental under an ordinary landlord-tenant lease of premises); and

(3) The institution either actively operates or supervises the operation of the place wherein the performance occurs or controls the performance, or has the right and ability to supervise the content of the infringing program.

Related Corporations: All related corporations, such as student organizations and affiliated organizations, faculty groups, fraternities and sororities, whose activities are related to the educational purposes of the institution, are covered by the licenses. These same groups are also covered by the blanket licenses when they lease a facility off campus where music is performed.

Addresses of the Licensing Organizations:

ASCAP
One Lincoln Plaza
New York, New York 10023
(212) 595-3050

BMI
40 West 57th Street
New York, New York 10019
(212) 586-2000

SESAC
10 Columbus Circle
New York, New York 10019
(212) 586-3450

SUMMARY

At this point it is the responsibility of each institution to review the proposed licenses and make its individual decisions regarding how to proceed and conform with requirements of the New Copyright Law. The higher education task force is not fully satisfied with the result of its negotiations. However, it is believed that the results offer a reasonable approach for a majority of colleges and

universities.

Although many matters are still not resolved, the higher education task force felt that this report was necessary since licensing organizations are in the process of forwarding their licenses to colleges and universities. The task force will be meeting further with the licensing organizations to review specific needs identified by institutions and to discuss special licensing arrangements to meet these needs.

Colleges and universities are strongly urged to review these issues with legal counsel, and to make available to members of the task force information related to specific licensing needs. Institutions are urged to raise questions regarding the agreements, minimal user problems, and specific music uses directly with the three licensing organizations (see addresses on page 12). Members of the task force would appreciate receiving copies of any such communications:

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SECTION 110 OF THE COPYRIGHT REVISION ACT OF 1976

§ 110. Limitations on exclusive rights: Exemption of certain performances and displays 17 USC 110.

Notwithstanding the provisions of section 106, the following are not infringements of copyright:

(1) performance or display of a work by instructors or pupils in the course of face-to-face teaching activities of a nonprofit educational institution, in a classroom or similar place devoted to instruction, unless, in the case of a motion picture or other audiovisual work, the performance, or the display of individual images, is given by means of a copy that was not lawfully made under this title, and that the person responsible for the performance knew or had reason to believe was not lawfully made;

(2) performance of a nondramatic literary or musical work or display of a work, by or in the course of a transmission, if—

(A) the performance or display is a regular part of the systematic instructional activities of a governmental body or a nonprofit educational institution; and

(B) the performance or display is directly related and of material assistance to the teaching content of the transmission; and

(C) the transmission is made primarily for—

(i) reception in classrooms or similar places normally devoted to instruction, or

(ii) reception by persons to whom the transmission is directed because their disabilities or other special circumstances prevent their attendance in classrooms or similar places normally devoted to instruction, or

(iii) reception by officers or employees of governmental bodies as a part of their official duties or employment;

(3) performance of a nondramatic literary or musical work or of a dramatico-musical work of a religious nature, or display of a work, in the course of services at a place of worship or other religious assembly;

(4) performance of a nondramatic literary or musical work otherwise than in a transmission to the public, without any purpose of direct or indirect commercial advantage and without payment of any fee or other compensation for the performance to any of its performers, promoters, or organizers, if—

(A) there is no direct or indirect admission charge; or

(B) the proceeds, after deducting the reasonable costs of producing the performance, are used exclusively for educational, religious, or charitable purposes and not for private financial gain, except where the copyright owner has served notice of objection to the performance under the following conditions; Notice of objection to performance.

(i) the notice shall be in writing and signed by the copyright owner or such owner's duly authorized agent; and

(ii) the notice shall be served on the person responsible for the performance at least seven days before the date of the performance, and shall state the reasons for the objection; and

Regulation.

(iii) the notice shall comply, in form, content, and manner of service, with requirements that the Register of Copyrights shall prescribe by regulation;

(5) communication of a transmission embodying a performance or display of a work by the public reception of the transmission on a single receiving apparatus of a kind commonly used in private homes, unless—

(A) a direct charge is made to see or hear the transmission; or

(B) the transmission thus received is further transmitted to the public;

(6) performance of a nondramatic musical work by a governmental body or a nonprofit agricultural or horticultural organization, in the course of an annual agricultural or horticultural fair or exhibition conducted by such body or organization; the exemption provided by this clause shall extend to any liability for copyright infringement that would otherwise be imposed on such body or organization, under doctrines of vicarious liability or related infringement, for a performance by a concessionnaire, business establishment, or other person at such fair or exhibition, but shall not excuse any such person from liability for the performance;

(7) performance of a nondramatic musical work by a vending establishment open to the public at large without any direct or indirect admission charge, where the sole purpose of the performance is to promote the retail sale of copies or phonorecords of the work, and the performance is not transmitted beyond the place where the establishment is located and is within the immediate area where the sale is occurring;

(8) performance of a nondramatic literary work, by or in the course of a transmission specifically designed for and primarily directed to blind or other handicapped persons who are unable to read normal printed material as a result of their handicap, or deaf or other handicapped persons who are unable to hear the aural signals accompanying a transmission of visual signals, if the performance is made without any purpose of direct or indirect commercial advantage and its transmission is made through the facilities of: (i) a governmental body; or (ii) a noncommercial educational broadcast station (as defined in section 397 of title 47); or (iii) a radio subcarrier authorization (as defined in 47 CFR 73.293–73.295 and 73.593–73.595); or (iv) a cable system (as defined in section 111(f)).

(9) performance on a single occasion of a dramatic literary work published at least ten years before the date of the performance, by or in the course of a transmission specifically designed for and primarily directed to blind or other handicapped persons who are unable to read normal printed material as a result of their handicap, if the performance is made without any purpose of direct or indirect commercial advantage and its transmission is made through the facilities of a radio subcarrier authorization referred to in clause (8)(iii), *Provided*, That the provisions of this clause shall not be applicable to more than one performance of the same work by the same performers or under the auspices of the same organization.

HOUSE JUDICIARY COMMITTEE DISCUSSION OF SECTION 110(4) FROM REPORT 94-1476

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Certain other nonprofit performances

In addition to the educational and religious exemptions provided by clauses (1) through (3) of section 110, clause (4) contains a general exception to the exclusive right of public performance that would cover some, though not all, of the same ground as the present "for profit" limitation.

Scope of exemption.—The exemption in clause (4) applies to the same general activities and subject matter as those covered by the "for profit" limitation today: public performances of nondramatic literary and musical works. However, the exemption would be limited to public performances given directly in the presence of an audience whether by means of living performers, the playing of phonorecords, or the operation of a receiving apparatus, and would not include a "transmission to the public." Unlike the clauses (1) through (3) and (5) of section 110, but like clauses (6) through (8), clause (4) applies only to performing rights in certain works, and does not affect the exclusive right to display a work in public.

No profit motive.—In addition to the other conditions specified by the clause, the performance must be "without any purpose of direct or indirect commercial advantage." This provision expressly adopts the principle established by the court decisions construing the "for profit" limitation: that public performances given or sponsored in connection with any commercial or profit-making enterprises are subject to the exclusive rights of the copyright owner even though the public is not charged for seeing or hearing the performance.

No payment for performance.—An important condition for this exemption is that the performance be given "without payment of any fee or other compensation for the performance to any of its performers, promoters, or organizers." The basic purpose of this requirement is to prevent the free use of copyrighted material under the guise of charity where fees or percentatges are paid to performers, promoters, producers, and the like. However, the exemption would not be lost if the performers, directors, or producers of the performance, instead of being paid directly "for the performance," are paid a salary for duties encompassing the performance. Examples are performances by a school orchestra conducted by a music teacher who receives an annual salary, or by a service band whose members and conductors perform as part of their assigned duties and who receive military pay. The committee believes that performances of this type should be exempt, assuming the other conditions in clause (4) are met, and has not adopted the suggestion that the word "salary" be added to the phrase referring to the "payment of any fee or other compensation."

Admission charge.—Assuming that the performance involves no profit motive and no one responsible for it gets paid a fee, it must still meet one of two alternative conditions to be exempt. As specified in subclauses (A) and (B) of section 110(4), these conditions are: (1) that no direct or indirect admission charge is made, or (2) that the net proceeds are "used exclusively for educational, religious, or charitable purposes and not for private financial gain."

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Under the second of these conditions, a performance meeting the other conditions of clause (4) would be exempt even if an admission fee is charged, provided any amounts left "after deducting the reasonable costs of producing the performance" are used solely for bona fide educational, religious, or charitable purposes. In cases arising under this second condition and as provided in subclause (B), where there is an admission charge, the copyright owner is given an opportunity to decide whether and under what conditions the copyrighted work should be performed; otherwise, owners could be compelled to make involuntary donations to the fund-raising activities of causes to which they are opposed. The subclause would thus permit copyright owners to prevent public performances of their works under section 110(4)(B) by serving notice of objection, with the reasons therefor, at least seven days in advance.

COPYRIGHT OFFICE FINAL REGULATIONS OF DECEMBER 28, 1977

[1410-03]

Title 37—Patents, Trademarks and Copyrights

CHAPTER II—COPYRIGHT OFFICE, LIBRARY OF CONGRESS

[Docket RM 77-7]

PART 201—GENERAL PROVISIONS

Notices of Objection to Certain Noncommercial Performances of Nondramatic Literary or Musical Works

AGENCY: Library of Congress, Copyright Office.

ACTION: Final regulation.

SUMMARY: This notice is issued to inform the public that the Copyright Office of the Library of Congress is adopting a new regulation pertaining to the service of notices of objection for the purpose of preventing certain noncommercial performances of nondramatic literary or musical works. The regulation is adopted to implement section 110(4) of the Act for General Revision of the Copyright Law. The effect of the regulation is to establish requirements governing the form, content, and manner of service of the notices.

EFFECTIVE DATE: This regulation takes effect on January 1, 1978.

FOR FURTHER INFORMATION CONTACT:

Jon Baumgarten, General Counsel, Copyright Office, Library of Congress, Washington, D.C. 20559, 703-557-8731.

SUPPLEMENTARY INFORMATION: Section 110(4) of the first section of Pub. L. 94-553 (90 Stat. 2541) deals with the performance of nondramatic literary or musical works otherwise than in transmissions to the public. It provides generally that such a performance, even if carried out before an audience, is exempt from copyright liability if two basic conditions are both met: (1) the performance must be "without any purpose of direct or indirect commercial advantage"; and (2) there must not be "payment of any fee or other compensation for the performance to any of its performers, promoters, or organizers."

Assuming these conditions are met, the exemption applies if there is "no direct or indirect admission charge" or, alternatively, if "the proceeds, after deducting the reasonable costs of producing the performance, are used exclusively for educational, religious, or charitable purposes. * * *" In cases where proceeds are to be derived from an admission charge, the statute also provides a procedure under which a copyright owner can prevent the performance by serving an advance notice of objection.

Under the statute, this notice must be in writing and signed by the copyright owner or the owner's authorized agent. It must be served on the person responsible for the performance at least seven days before the date of the performance, and it must state the reasons for the objection. The Act also provides that the notice of objection must "comply in form, content, and manner of service with requirements that the Register of Copyrights shall prescribe by regulation."

On September 2, 1977, we published in the FEDERAL REGISTER (42 FR 44247) a proposal to adopt a new regulation § 201.13 establishing requirements governing the form, content, and manner of service of notices of objection. A total of twelve initial and reply comments were received in response to that proposal. Several of these comments have led us to make changes of substance in the regulation as originally proposed. A discussion of the major substantive comments follows:

1. IN GENERAL

For the most part the persons commenting on the proposed regulation fell into two categories: Those who considered some or all of the proposed requirements for a notice much too restrictive, and those who supported the proposal because of its restrictive requirements. One comment urged that, under the regulation, users be required to give advance notice to copyright owners; it took the position that, unless the initial requirements for serving notice were placed on the user, the purpose of the statute could be served only by placing few if any restrictions on the right of copyright owners to serve blanket notices. Other comments took the opposite view: That there would be no justification for placing the burden of serving advance notice on the user, and that the regulations should not encourage the routine filing of blanket notices that would in practice require the payment of royalties for all nonprofit performances where admission fees are charged.

After careful consideration the Copyright Office can see no basis for requiring, by regulation, the user to notify the copyright owner of the performance or the works to be performed. At the same time, we recognize the formidable practical problems facing copyright owners in learning of performances and in giving meaningful notices. On the basis of the comments, we believe that the requirements under our earlier proposals would have been too stringent to be practical. We have therefore made some substantial changes which liberalize the requirements, particularly in the area of blanket notices.

2. CONTENTS OF NOTICE

Reference to statutory authority. One comment recommended changing the obligation to refer to "17 U.S.C. § 110 (4)" to a more general requirement. We agree that, as long as the user is given a general reference to the statutory provision involved, an explicit citation is not necessary, and we have revised the proposed regulation accordingly.

Date and place of performance. Two comments objected to the proposed requirement that, where the exact date or place of a particular performance, or both, are not known, the notice must describe "all of the information the copyright owner has about the plans for the particular performance and the source of that information." It was argued that, since only the time and place of the performance are relevant, the copyright owner should not be required to give other information; it was also urged that a requirement for revealing the source of the information might be inhibiting if the source were confidential. We believe these arguments have merit, and have revised paragraph (c)(1)(ii) accordingly. However, we cannot agree with the further suggestion that a notice be considered valid even if the copyright owner has no information whatever about any plans for a performance. We believe that the statutory scheme envisioned the serving of notices with respect to particular performances, and was not intended to allow the filing of one blanket notice that would be effective for all future performances by a particular user and for all time to come.

Identification of works. Objections were also raised with respect to those parts of the regulation requiring clear identification of the particular works involved by title and author, and permitting the service of blanket objections only under certain rather restrictive conditions. The substance of these objections, which we have accepted to some extent, is discussed below in connection with paragraph (c)(2), dealing with the requirements for blanket notices. We have amended paragraph (c)(1)(iii) to reflect the liberalized requirements for blanket notices in paragraph (c)(2). The thinking behind revised paragraph (c)(1)(iii) is that, if the copyright owner is aware of the particular works to be performed, or if the owner has objections to the performance of particular works, those works should be clearly identified; however, if the objections extent beyond the particular works identified, or if no particular works are identified, the notice of objection can include a blanket objection to the performance of unspecified works of that copyright owner, if the conditions for the service of blanket objections are met.

Statement of reasons. No objections were raised with respect to the specific provision of paragraph (c)(1)(iv), requiring "a concise statement of the reasons for the objection." However, strong exception was taken to statements in the preamble to the proposed regulation indicating that, in the view of the Copyright Office, the legislative history of section 110(4) "suggests that notices of objection were not intended to consist of general or blanket prohibitions, but were intended to be the result of individual copyright owners' decisions based on personal objections to having their works used without permission for 'education, religious, or charitable' fund raising activities with which they were not in sympathy." Upon further consideration we adhere to the first part of this statement—that the intention of the statute was for notices to be filed in particular cases rather than on a blanket basis. However, we agree that the last part of the statement—that the objections were intended to be based on personal reactions against having an individual owner's works used for causes with which that owner is unsympathetic—is too restrictive. While this thinking undoubtedly influenced the Congressional decision to provide for a "veto" in section 110(4)(B), there is nothing in the statute or its legislative history to prevent a copyright owner from filing an objection based on a desire not to have his or her works performed without permission under any circumstances when an admission fee is charged.

Blanket Notices. As already indicated, the strongest and most serious objections to the proposed regulation dealt with the conditions for the validity of "a blanket notice lacking separate identification of the particular copyrighted works covered by the objection." Section 110(4) speaks in terms of exempting from liability the "performance of a nondramatic literary or musical work," and passes on to the Register of Copyrights the responsibility for prescribing the "form, content, and manner of service" of notices of objection that, if served by "the copyright owner" under specified conditions, will negate the exemption. Taken as a whole, we believe the Register's responsibility in issuing these regulations is to reach a reasonable balance that carries out the fundamental purposes of section 110(4) in practice. As a practical matter, we believe this means that blanket objections should be permitted to the extent that they are necessary to avoid unfair burdens on copyright owners, but not to the extent that they are used routinely to render the exemption of section 110(4) nugatory whenever admission fees are charged. Achieving this balance is extremely difficult but, since Congress has chosen to entrust this responsibility to the Copyright Office, we cannot abdicate it.

It should be recognized that the system envisioned by section 110(4)(B) of the statute represents an entirely new departure in copyright law, and that any effort to implement it must necessarily be considered experimental. It will, of course, be necessary to evaluate very closely how these regulations work out in practice over a reasonable period of time. If it should become apparent that these regulations are being used to negate the exemption of section 110(4), we will be prepared to consider appropriate amendments.

Under our earlier proposal, the validity of blanket notices would have depended on five conditions: (1) all copyrights must have at least one common owner who has authorized service of the objection and is identified in the notice; (2) the owner lacks complete knowledge of the works to be performed and wishes to object to "a particular performance of any or all works of which he or she is copyright owner"; (3) more than one hundred works are involved; (4) if the notice is served by an agent or performing rights society, the owner must have expressly authorized the service with respect to the particular performance and works; and (5) the Notice must identify a person to contact for information about particular titles. There were strenuous objections to these conditions; authors and publishers objected particularly to the third and fourth conditions on the grounds of burdensomeness and impracticality, and one performing rights society argued that imposing the first four of the five conditions would, in effect, reduce a "meaningful right" to a "compulsory and gratuitous license." In the light of these arguments, we have modified our earlier proposal in an effort to make the requirements for blanket notices less onerous and more practical while, at the same time, seeking to provide the user with meaningful information as to the particular works covered by the notice.

A point of particular concern involves the status of performing rights societies under the regulation, whether as "copyright owners," "duly authorized agents," or otherwise. Upon consideration of the various questions raised in this connection we have concluded that it would be a mistake to deal with performing rights societies as a category separate and different from the two categories identified in the statute as entitled to sign the notice: "the copyright owner" and "such owner's duly authorized agent." We have therefore deleted the definition of "performing rights society" in subsection (a) and the references to performing rights societies in subsections (c)(2) and (c)(4) and have added a definition of "copyright owner" for purposes of this section.

As modified, the requirements for a blanket notice under subsection (c)(2)

are substantially liberalized. A notice can be filed by an agent for more than one copyright owner. Instead of the earlier requirements that the owner lodge objection with respect to all works of which he or she is copyright owner and that these works total one hundred or more, the final regulation asks for some descriptive identification of the common characteristics shared by each group of works covered by the blanket notice (e.g., common author, owner, publisher or licensing agent). The requirement for express authorization has been dropped, but the provision requiring identification of an individual who can be contacted for further information has been expanded in an effort to insure that users are not left in the dark as to whether a particular work or works is actually covered by the blanket notice. Additionally, where the notice does not identify the copyright owner, the agent filing the objection must include an offer to identify the owner or owners, so that the person responsible for the performance can contact them directly.

3. SIGNATURE AND SERVICE

Several comments suggested that, because of the strict time-limit provided by the statute, it should be possible to file notice by wire, following up with a confirmation bearing a handwritten signature. We have adopted this suggestion and, as recommended in one of the comments, have added a requirement that the date of signature be included in the notice. Because of questions raised as to the effective date of service, we have also added a provision making clear that it is the date the notice is received by the person responsible for the performance.

4. EFFECTIVE DATE OF REGULATION

As recommended in the one comment received on the point, the effective date of the final regulation is January 1, 1978. This is the effective date of the new Act, and it would not be fair to copyright owners to delay the effective date of the regulation beyond the date when their rights are established by law.

Final Regulation. Part 201 of 37 CFR Chapter II is amended by adding a new § 201.13 to read as follows:

§ 201.13 Notices of objection to certain noncommercial performances of nondramatic literary or musical works.

(a) *Definitions.* (1) A "Notice of Objection" is a notice, as required by section 110(4) of title 17 of the United States Code as amended by Pub. L. 94-553, to be served as a condition of preventing the noncommercial performance of a nondramatic literary or musical work under certain circumstances.

(2) For purposes of this section, the "copyright owner" of a nondramatic literary or musical work is the author of the work (including, in the case of a work made for hire, the employer or other person for whom the work was prepared), or a person or organization that has obtained ownership of the exclusive right, initially owned by the author, of performance of the type referred to in 17 U.S.C. § 110(4). If the other requirements of this section are met, a Notice of Objection may cover the works of more than one copyright owner.

(b) *Form.* The Copyright Office does not provide printed forms for the use of persons serving Notices of Objection.

(c) *Contents.* (1) A Notice of Objection must clearly state that the copyright owner objects to the performance, and must include all of the following:

(i) Reference to the statutory authority on which the Notice of Objection is based, either by citation of 17 U.S.C. § 110(4) or by a more general characterization or description of that statutory provision;

(ii) The date and place of the performance to which an objection is being made; however, if the exact date or place of a particular performance, or both, are not known to the copyright owner, it is sufficient if the Notice describes whatever information the copyright owner has about the date and place of a particular performance, and the source of that information unless the source was considered private or confidential;

(iii) Clear identification, by title and at least one author, of the particular nondramatic literary or musical work or works, to the performance of which the copyright owner thereof is lodging objection; a Notice may cover any number of separately identified copyrighted works owned by the copyright owner or owners serving the objection. Alternatively, a blanket notice, with or without separate identification of certain copyrighted works, and purporting to cover one or more groups of copyrighted works not separately identified by title and author, shall have effect if the conditions specified in paragraph (c) (2) of this section are met; and

(iv) A concise statement of the reasons for the objection.

(2) A blanket notice purporting to cover one or more groups of copyrighted works not separately identified by title and author shall be valid only if all of the following conditions are met:

(i) The Notice shall identify each group of works covered by the blanket notice by a description of any common characteristics distinguishing them from other copyrighted works, such as common author, common copyright owner, common publisher, or common licensing agent;

(ii) The Notice shall identify a particular individual whom the person responsible for the performance can contact for more detailed information about the works covered by the blanket notice and to determine whether a particular work planned for performance is in fact covered by the Notice. Such identification shall include the full name and business and residence addresses of the individual, telephone numbers at which the individual can be reached throughout the period between service of the notice and the performance, and name, addresses, and telephone numbers of another individual to contact during that period in case the first cannot be reached.

(iii) If the copyright owner or owners of all works covered by the blanket notice is not identified in the Notice, the Notice shall include an offer to identify, by name and last known address, the owner or owners of any and all such works, upon request made to the individual referred to in paragraph (c) (2) (ii) of this section.

(3) A Notice of Objection must also include clear and prominent statements explaining that:

(i) A failure to exclude the works identified in the Notice from the performance in question may subject the person responsible for the performance to liability for copyright infringement; and

(ii) The objection is without legal effect if there is no direct or indirect admission charge for the performance, and if the other conditions of 17 U.S.C. § 110 (4) are met.

(d) *Signature and Identification.* (1) A Notice of Objection shall be in writing and signed by each copyright owner, or such owner's duly authorized agent, as required by 17 U.S.C. § 110(4) (B) (i).

(ii) The signature of each owner or agent shall be an actual handwritten signature of an individual, accompanied by the date of signature and the full name, address, and telephone number of that person, typewritten or printed legibly by hand.

(iii) If a Notice of Objection is initially served in the form of a telegram or similar communication, as provided by paragraph (e) of this section, the requirement for an individual's handwritten signature shall be considered waived if the further conditions of said paragraph (e) are met.

(e) *Service.* (1) A Notice of Objection shall be served on the person responsible for the performance at least seven days before the date of the performance, as provided by 17 U.S.C. § 110(4) (B) (ii).

(2) Service of the Notice may be effected by any of the following methods:

(i) personal service;

(ii) first-class mail;

(iii) telegram, cablegram, or similar form of communication, if: (A) the Notice meets all of the other conditions provided by this section; and (B) before the performance takes place, the person responsible for the performance receives written confirmation of the Notice, bearing the actual handwritten signature of each copyright owner or duly authorized agent.

(3) The date of service is the date the Notice of Objection is received by the person responsible for the performance or any agent or employee of that person.

(17 U.S.C. 207, and under the following sections of Title 17 of the United States Code as amended by Pub. L. 94-553: §§ 110(4); 702.)

Dated: December 20, 1977.

BARBARA RINGER,
Register of Copyrights.

Approved by:

DANIEL J. BOORSTIN,
Librarian of Congress.

[FR Doc.77-36956 Filed 12-27-77;8:45 am]

Publications for Effective College and University Administration Available from NACUBO

College and University Business Administration, Third Edition (1974). This edition, a revision of the 1968 version, includes seven new chapters on financial accounting and reporting. Known as the most authoritative guide to principles of business and financial management in higher education, it is a basic reference for the business officer, finance officers, accountants and others. $20.00.

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Administrative Service. Incorporating *College and University Business Administration,* Third Edition, the Service is available in two looseleaf binders, which permit revision and supplementation. Subscriptions are on a calendar-year basis, and materials are mailed every two months. This publication enables the business or financial officer to keep up-to-date on management principles and practices in higher education. Subscriptions: $25.00 for members ($15.00 for renewals), $45.00 for nonmembers ($35.00 for renewals).

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Federal Regulations and the Employment Practices of Colleges and Universities (1974), published by the association and cosponsored by eight other organizations, is a looseleaf service providing higher education administrators with in-depth information on federal laws affecting institutional employment practices. Twelve areas of federal law are covered by the service, which is revised several times each year to reflect new government directions. One free copy is provided to each member institution. Additional annual subscriptions: $25.00, (renewal fee of $10.00).

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A College Planning Cycle: People, Resources, Process (1975). This planning guide enables colleges and universities to implement planning and budgeting without consultants. Planning and budgeting are treated as part of one process and the procedures utilize the "team" concept. $10.00.

Management Reports: A System of Reporting and Accounting (1976). This manual is designed to express a philosophy of reporting and to present a logical system of accounting from which informative reports might emanate. Together with *A College Planning Cycle,* it offers a comprehensive approach to planning, budgeting, accounting and reporting. $10.00.

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Government Contracts and Grants for Research: A Guide for Colleges and Universities (1975). This is a compilation and analysis of more than 100 contract clauses that appear in federal agreements. There are narrative sections on research grants and sponsored programs of private foundations. This is a valuable reference tool for those involved in administering programs sponsored by the federal government. $15.00.

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Reporting on Investments of Endowment Funds (1975) is a monograph designed to encourage and assist college and university officers at institutions having permanent funds to make a public report of the stewardship of those funds. It describes and demonstrates reporting formats and performance measurement techniques. $5.00.

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Bond Valuation for Colleges and Universities (1977) evaluates various methods and services used for pricing bonds with the view of providing college and university administrators with criteria for choosing the method and service suitable to the institution's bond portfolio. $5.00.

Investment Policies and Procedures at Selected Colleges and Universities (1977) is a compilation of investment policies and procedures in effect at ten colleges and universities and at The Common Fund. The three subjects covered in the guide are: investment goals and objectives, accepting life income funds and gift annuities, and social responsibility in investing. $10.00.

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Energy Management for Colleges and Universities (1977) was written to assist college and university administrators in designing, implementing, and sustaining efficient energy management programs at institutions of higher education. $20.00.

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Student Loan Collection Procedures (1977) is a manual designed to present business and financial aid officers with a general process for the collection of student loans. In addition to coverage of general practices and procedures, specific requirements are discussed regarding the NDSL, GSL, Health Professions, and Nursing loan programs. $10.00.

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Cash Management and Short-Term Investments for Colleges and Universities (1977) is a detailed description of how to make maximum use of temporary excess working capital (permanent funds are not considered in this book). Included are methods of investing in money market instruments and measuring yield. $15.00.

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Conference for Women Administrators on Financial Management of Colleges and Universities (1977) is a manual with more than 200 pages of lecture material, case studies, visual aid material, handout and logistical details necessary for conducting financial management conferences. $25.00.

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